HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Criminal Appeal No. 392 / 1985

Narayan Singh son of Pratap Dan, by caste Charan resident of Haroti, Tehsil Gogunda, District Udaipur,

----Appellant

Versus

State of Rajasthan

----Respondent

Connected With

D.B.CRIMINAL APPEAL No. 408 / 1985

1. Bagh Singh S/o Bharat Singh
2. Gopal Singh S/o Hamer Singh
3. Roop Singh S/o Hamer Singh

All by Caste Rajputs, Resident of Village Jhadoli, District Udaipur.

----Appellants

Versus

The State of Rajasthan

----Respondent

D.B.CRIMINAL APPEAL No. 28 / 1986

1. Ganeshdan S/o Dherudan by caste Charan, resident of Jhadoli, District Udaipur.
2. Bhajja S/o Hakra, by caste Kumhar, resident of Jhadoli, District Udaipur.

----Appellants

Versus

State of Rajasthan

----Respondent

For Appellant(s) : Mr.Dungar Singh

For Respondent(s) : Mr. JPS Choudhary

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE GOVERDHAN BARDHAR

CAV JUDGMENT

PER HON'BLE BARDHAR, J.

***12*/01/2017**

The present appeals have been filed by the Appellants against the judgment dated 18.11.1985 passed by learned Sessions Judge, Udaipur in Sessions trial No. 93/1984 whereby, the learned Judge has convicted the appellants to life imprisonment under Section 302/148 IPC alongwith fine and default stipulation and also variously under Sections 341, 324 and 323 IPC.

During the pendency of the appeal, Appellants Khuman Singh, Malam Singh and Hakma died on 01.07.1996, 03.01.2015 and 04.10.2004 respectively and their appeal already stands abated.

Out of three appeals, Mr. Dungar Singh appears on behalf of appellants in Criminal Appeal Nos. 408/985 and 28/1996 but none appears to argue the Criminal Appeal No. 392/1985.

Appeal No. 392/1985 was instituted on 09.12.1985 and the Appellant enlarged on bail on 08.09.1999. Considering the age of the appeal, the period since grant of bail to the Appellant and absence of representation on his behalf, we are not inclined to adjourn the matter further and the appeal has therefore been taken up for consideration alongwith Appeal No. 408/1985 and 28/1986 with assistance of Mr. Singh and Counsel for the State.

An FIR came to be lodged on 17.03.1984 at Police Station Gogunda by Shambhu Singh alleging therein that Daulat Singh had come to Jhadoli for the purpose of attending "Dhund' ceremony as Shambhu Singh and Bhawani Singh were blessed with sons. It is alleged that Daulat Singh came to the house of Bhawani Singh at 9 pm and at that time, Bhawani Singh, Shail Singh and Shambhu Singh were at home. Daulat Singh after having dinner decided to leave for his village Tarpal at about 10 pm but he was advised by Shambhu Singh, Bhawani Singh and Shail Singh not to leave in the night but Daulat Singh insisted to go and he started from the residence of Bhawani Singh and Shail Singh went to see him off at the 'Pole'. As per allegation in the FIR when they reached outside the 'Pole', Shail Singh raised hue and cry upon which the complainant, his mother Mohan Bai and brother Bhawani Singh came to the 'pole' and saw that Ganesh Dan, Hamer Singh, Bagh Singh, Manohar Singh were assaulting Shail Singh and Daulat Singh. It is alleged that when complainant tried to intervene, he was also assaulted by lathi on the head and his mother was injured by axe. It is further alleged that when Daulat Singh got up and ran towards Tarpal, they were joined by Khuman Singh, Hukma Kumar, Narayan Singh, Malam Singh, Gop Singh, Roop Singh, Bhajja Kumar armed with lathis. All of them after surrounding Daulat Singh attacked with lathi and axe and killed him.

In support of prosecution story, the prosecution examined 23 witnesses and exhibited 48 documents. The statements of

appellants were recorded under Section 313 Cr.P.C. wherein they denied the allegations and claimed trial.

PW/4 Shambhu Singh, PW/5 Shail Singh and PW/9 Mohan bai are injured witnesses who have admittedly suffered injuries during the said incident and in their evidence they have stated that the injuries were caused by the accused persons.

On the basis of evidence on record especially evidence of aforesaid three injured witnesses, the learned trial court convicted and sentenced the accused appellants to life imprisonment.

Counsel for the appellants submitted that there is delay in sending the report to the Court as the FIR was lodged on 17.03.1984 but it reached the Court on 19.03.1984. Further as per evidence of PW/2 Hakma at the time of incident, the whole village was there celebrating Holi festival but there is not a single independent witness from the village who has been produced in support of prosecution case, hence adverse inference ought to have been drawn against the prosecution on account of non-production of such persons. It is further submitted that the investigation was also unfair as there is no explanation as to what were such mitigating circumstances under which the police thought it appropriate to have the statements of PW/3 Bhawani Singh, PW/4 Shambhu Singh and PW/5 Shail Singh recorded under Section 164 Cr.P.C. It is argued that no effort whatsoever has been made by the prosecution to find out as to who were the actual assailants, their individual role and what was their number. There is also no specific role assigned to the individual accused

and the accused have been convicted on the basis of omnibus statement of witnesses. Learned Sessions Judge has acquitted the accused Hamir Singh on the same set of evidence whereas, three sons of Hamir Singh have been falsely implicated and accused Manohar Singh was also acquitted in a separate trial.

It is further argued that PW/3 Bhawani Singh has stated that he did not see the assault. The evidence of interested witnesses have not been corroborated by any independent source and in view of the number of injuries sustained by deceased Daulat Singh and his companions, it is a clear case of over-implication. Learned counsel further argued that no blood is collected from the place of assault in the first part of incident which creates doubts in the prosecution story. The absence of collection of blood from the first place of part of incident renders the evidence of prosecution not credible. There is no description in the site plan (Ex.P/2) about the place where the body of Daulat Singh was found. Counsel further argued that Ex.P/48 which is the report submitted by accused Narayan Singh and Manohar Singh against the deceased Daulat Singh and three other companions regarding altercation with Hukma and Bagh Singh, has not been taken into consideration. In view of the report Ex.P/48 and the discrepancy in evidence of prosecution, in all likelihood the deceased had altercation with the village people and in that altercation, injuries were caused to Daulat Singh. It is further argued that the allegation made by eye-witnesses PW/3 Bhawani Singh, PW/4 Shambhu Singh and PW/5 Shail Singh to the effect that accused

Ganesh Dan gave two blows on the back of head of deceased from sharp side of axe, which has been believed by the learned Trial Court does not corroborate with the medical evidence as injury no.2 on the head is the cause of death and same is lacerated wound. As per learned counsel for the appellants, in absence of authorship of fatal injury, there is no way all the accused persons can be held responsible for offence of murder under Section 302 simplicitor. In support of arguments, he placed reliance on AIR 1966 SC 1742 (Lakhan Mahto and others Vs. State of Bihar).

Per contra, learned Counsel for the State argued that judgment of the learned trial court is mainly based on testimony of three eye witnesses PW/3, PW/4 and PW/5. Learned Public Prosecutor further argued that the learned trial court has found the evidence of aforesaid eye-witnesses to be trustworthy who have spoken about role and the overt act of the accused. PW/3 Bhawani Singh, PW/4 Shambhu Singh and PW/5 Shail Singh have categorically stated about the incident which occurred at the "Pole" i.e. front side of house of Shail Singh and so also about the place of assault in the second part of incident where the assailants chased Daulat Singh and assaulted. The witnesses have categorically stated that they were present all the way during the course of entire incident and the evidence of aforesaid witnesses is also corroborated by the evidence of Dr. Om Prakash who conducted the autopsy on the body of Daulat Singh which strengthens the case of the prosecution. Learned Counsel for the

State argued that learned Trial Court has rightly convicted the accused persons and sentenced them for offence under Section 302 IPC which does not call for any interference.

We have considered the submissions on behalf of parties and carefully scanned the material on record, exhibits and the deposition of witnesses.

Entire prosecution case hinges on testimony of three eye witnesses, namely, PW/3 Bhawani Singh, PW/4 Shambhu Singh and PW/5 Shail Singh and recovery of weapons at instance of accused-appellants. These two factors have weighed with learned trial Court in recording finding of conviction against them. What has to be considered is whether the allegations against present accused appellants have been proved beyond reasonable doubt. It is to be observed here that mere fact that witnesses happen to be related to deceased, would not be a reason to entirely discard their testimony, although it is true that Court has to minutely scrutinize their statements.

During trial, prosecution has produced four eye-witnesses namely, PW/3 Bhawani Singh P/4 Shambhu Singh, PW/5 Shail Singh and PW/9 Mohan Bai and the investigating officer together with opinion of the doctor PW/18 Dr. Om Prakash.

PW 18 Dr. Om Prakash conducted autopsy on the body of Daulat Singh on 17.03.1984 and found the following injuries :

> (1) Two lacerated ante-mortem wounds were present on the posterior aspect of the scalp over the upper part of the occipital bone of the skull.
> (a) 2”X01”Xskin & Fascia deep

(b) 2" X01"X skin & fascia deep (longitudinal)

There were large quantity of blood present over the surface of the wounds & semi fluid inconsistency. The injuries were simple in nature and caused by blunt weapon.

(2) Lacerated wound ante-mortem in nature was present on the left side of the scalp over the frontal bone of the skull 1" above the zygomatic bone of the skull.

size 3"X2"

The tissues underneath the wound were greatly congested on dissection. There was large haematoma present underneath the injury over the frontal & temporal bone of the skull extending upto the left side of the face. There was fissured & depressed fracture of the frontal bone of the skull on the left side. The zygomatic process the supraorbital plate of the frontal creamial tissue & the bones of the base of the skull on left side were fractured. The brain was congested & there was haemorrhage. The injury was grievous & dangerous to life caused by blunt & heavy weapon.

(3) Incised – Ante-mortem wound was present on the left side of the forehead rust above the left eyebrow transverse in direction. Size 2.5 cm X 1 cmX skin and fascia deep injury is simple & caused by sharp weapon.

(4) Lacerated wound ½ cm X 0.4 cm present 1/2" away from the __ angle of the left eye, bone deep.

(5) Abrasion face swelling 6 cm X 5 cm present on the left cheek caused by blunt weapon—simple.

(6) Cut-wound Rt. Nostril of the nose-2cm X 0.4cm cut nostril at both the ends caused by sharp weapon.

(7) Cut wound present on the Rt. Side of the chin two in numbers.

(a) 3cm X 0.4cm X bone deep (b) 1cmX0.3cm 1/2" below the injury No.(a) caused by sharp weapon.

(8) Contusion present in front of the left side of the chest at the level of left infra clavicular region size 3"x2".

(9) Contusion present on the right shoulder, over the right clavicle 4cmX1.5cm

(10) Contusion present on the right side of the back longitudinal 12"X1" reddish blue in colour.

(11) Contusion 10"X1" present on the left side of the back reddish blue in colour.

(12) Contusion present on the left thigh upper and outer part size 3"X2"

(13) Abrasions Two in numbers 1"X ½", 3/4" X 1/2" front of the left thigh.

(14) Abrasion 6 in numbers present on the right buttock each measuring ¾ to 1 cm in diameter.

(15) Abrasion 2 in numbers each measured 1”X1/2” present in front of the left thigh.

(16) Incised longitudinal wound 1.3 cm X o.3 cm deep present in front of the left leg caused by sharp weapon.

(17) Incised wound ante-mortem nature present on the right side of the lip between the mustaches size 3 cm X 0.3 cm opening into the mouth caused by sharp weapon.

The complainant PW/4 Shambhoo Singh who lodged the FIR Exhibit.P/3 on 17.03.1984 in his evidence has stated that deceased Daulat Singh started from the residence of Bhawani Singh and Shail Singh went to see him off. When they reached outside the ‘pole’ Shail Singh raised hue and cry upon which he ran outside and saw that Ganesh Dan, Hamer Singh and Manohar Singh were assaulting Shail Singh and Daulat Singh. Ganesh Dan was having axe in his hand, Bagh Singh was armed with thorny lathi, Hamer Singh and Manohar Singh were armed with lathis. Ganesh Dan inflicted injry with axe on the left side of forehead near the eye. He has further stated that Bagh Singh gave a lathi blow to Daulat Singh on his right rib and Manohar Singh gave one lathi blow on Daulat Singh’s right shoulder. Hamer Singh gave lathi blow to Daulat Singh on his left shoulder. He has stated that Daulat Singh fell on ground but he got up and started to run towards Tarpal but Hamer Singh, Bagh Singh, Manohar Singh and Ganesh Dan ran after him. When the accused persons reached the house of Hakma Ram, Malam Singh, Gopal Singh, Khuman Singh, Roop Singh, Narayan Singh, Hakma and Bhajja came armed with lathis and started to run after the deceased. Thus, at the relevant time Daulat Singh was being chased by

eleven persons. He further states that all the eleven persons surrounded the deceased and started inflicting injuries with axe and lathis. Ganesh Dan assaulted on the left eye of Daulat Singh with axe, Bagh Singh hit him on left shoulder and Gopal Singh hit him on the left thigh due to which he fell on ground. Thereafter, Ganesh dan gave two more axe blows on the back side of head of Daulat Singh. Due to these injuries, Daulat Singh lost consciousness. When the complainant checked Daulat Singh, he had died. He has further categorically stated in the cross-examination that when the accused persons chased the deceased, he and his brother cried for help but none of the villagers came for help.

Similarly, injured witness PW/5 Shail Singh @ Vijay singh has corroborated the aforesaid version and while corroborating the prosecution story has stated that when the deceased reached the 'pole' accused Ganesh Dan gave first blow on the left side of nose of deceased and second blow on the left side of forehead. The other accused persons Bagh Singh, Manohar Singh, Hamer Singh were carrying lathi. Upon raising cry, his mother Mohan Bai so also Bhawani singh Shambhu Singh and Hukmi Dan came who were also assaulted by accused persons. As per said witness Shail Singh, after the deceased Daulat Singh was surrounded by accused persons, Bagh Singh and Gop Singh gave lathi blows to deceased due to which deceased fell down and while the deceased was lying on ground, Ganesh Dan inflicted two blow of axe upon the deceased from the blunt side.

These two injured eye witnesses not only corroborated their respective accounts but were not shaken in cross-examination.

Another witness of the incident, PW/3 Bhawani Singh in his statement clearly stated that when he heard the cry of Shail singh he went out and he saw that deceased was lying outside drenched in blood who was being beaten by Ganesh Dan, Bagh Singh, Manohar Singh, Hamer Singh. Upon intervention Bagh singh gave lathi blow on head to Shambhoo Singh and Shail Singh. As per PW/3 Bhawani Singh, when he came out of 'Pole' he saw injury on face and head of deceased caused by the accused. It has been further stated that the four accused persons were joined by other seven accused persons who were armed with lathis and all of them circled deceased Daulat singh and assaulted him due to which Daulat Singh fell on ground. In the cross-examination the said witness has stated that when deceased Daulat Singh was lying on the ground, accused Ganesh Dan inflicted a blow of axe upon the head of the deceased.

Similarly, the third injured witness PW/9 Mohan Bai in her statement has also supported the story of aforesaid eye witnesses and has stated that when she came out of house and intervened, accused Ganesh Dan gave axe blow on her left hand.

The evidence of eye-witnesses is also corroborated by evidence of Dr. Om Prakash as per postmortem report Ex.P/24. Injury No.3 is the incised wound on right side of the forehead above eye and second wound below the nostrils. The deceased had sustained seventeen injuries out of which Injury no.1 & 2 are

lacerated wounds and on the head. Similarly, the evidence of assault by accused upon the eye witnesses is also corroborated by the medical report Exhibits. P/9, 25, & 26.

It is trite law that the evidence of injured witness, being a stamped witness, is accorded a special status in law. This is a consequence of the fact that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let the actual assailant go unpunished. Looking to the statements of the injured eye-witnesses and evidence of Dr. Om Prakash, presence of aforesaid witnesses at the places of occurrence is established and there is no reason to disbelieve the testimony of injured eye-witnesses at all.

It is also relevant to note that evidence of witnesses is not inconsistent with medical evidence and place of occurrence and injured eye witnesses not being able to tell the Court as to how many injuries were received by the deceased and with what weapons, the factum of their being beaten up by the persons who were named is not shaken. It is obvious that in the night it is very difficult to make out who hit whom and with what. The learned Sessions Judge painstakingly went through the evidence of all witnesses including the three injured eye witnesses and the Doctor PW. 18 who testified that the death was homicidal in nature and the Investigating Officer deposed as to the recovery of the weapons that were used in the incident.

Thus, the courts below has gone through the evidence and have relied heavily upon the evidence of injured eye witnesses and the Investigating Officer together with the opinion of doctor Om Prakash.

In this case as per FIR Exhibit P/3, the incident took place on the day of Holi festival and as per evidence on record, it is revealed that there is no delay in the investigation and merely the report was sent to the Court on 19.03.1984 which does not create any doubt upon the fairness of investigation.

So far as acquittal of accused Hamer Singh is concerned, there is no appeal against his acquittal. Learned Trial Judge in para 54 has observed Hamer Singh was 72 years old and due to disability could not walk without crutches whereas the prosecution witness PW/5 Shail Singh categorically stated that accused ran after Daulat Singh and hit him near the house and thereafter at the Chabutra and did not assaulted in between. In the light of evidence on record, the Trial Court acquitted Hamer Singh while granting him benefit of doubt.

One of the arguments of learned counsel for the appellants was to the effect that no blood stained clothes, soil etc were collected during the investigation from the place of first part of incident. In this regard, reference can be made to judgment of Hon’ble Apex Court in State of Rajasthan v. Arjun Singh and Ors.: (2011) 9 SCC 115. In the said decision the Court has opined that absence of evidence regarding recovery of used pellets,

bloodstained clothes, etc. cannot be taken or construed as no such occurrence had taken place. It has been further observed that when there is ample unimpeachable ocular evidence and the same has received corroboration from the medical evidence, even the non-recovery of weapon does not affect the prosecution case.

As far as the contention of learned counsel for the appellants to the effect that all the appellants could not have been convicted under Section 302 IPC because as per postmortem report cause of death was due to hemorrhage, shock, syncope & coma produced by fatal injury No.2 present on the left side of the skull leading to the fracture of left frontal bone of the skull, the left bone of the skull caused by heavy blunt weapon. Learned counsel for the appellants relied upon the case reported in AIR 1966 SC 1742 (Lakhan Mahto and others Vs. State of Bihar). In the said case, the Apex Court had observed that by framing a charge under Section 302 read with Section 149 IPC against the appellant it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under Section 302 of IPC was to convict him of an offence with which he had not been charged. In the matter in hand, on perusal of record, it is revealed that charge was framed against the accused on 16.10.1984 that they were member of an unlawful assembly and did commit murder by intentionally or knowingly causing death of Dault Singh and committed an offence punishable under Section 302 IPC or they being member of an unlawful assembly in prosecution of common object to commit murder of Daulat Singh caused death of

Daulat Singh and guilty of offence under Section 149 IPC causing offence under Section 302 IPC. On perusal of evidence on record, we find that the facts and circumstances clearly bring out that there was an unlawful assembly and under Section 149 IPC if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Each of the accused persons were very well aware that they are being tried for being part of assembly which was armed with weapons and hence, it was an unlawful assembly. On a close scrutiny of evidence on record, it is difficult to hold that any prejudice has been caused to the appellants accused and thus, the said submission pales into insignificance.

In the above back drop, on analyzing the testimony of the injured eye witnesses, we find no reason to interfere with the conviction of the appellants.

The appeals are dismissed. The bail bonds of the Appellants are hereby cancelled. They are directed to surrender forthwith and/or be taken into custody for serving out the remaining period of sentence.

(GOVERDHAN BARDHAR)J. (NAVIN SINHA)C.J.

bjsh